

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ANDREW C.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. 24-0450 BAT

**ORDER REVERSING THE  
COMMISSIONER’S DECISION**

Plaintiff appeals the ALJ’s denial of his application for Disability Insurance Benefits. He contends the ALJ erred in assessing medical opinion evidence and erred in his findings regarding Plaintiff’s past relevant work as a hand packager. Dkt. 11. For the reasons below, the Court **REVERSES** the Commissioner’s final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

**BACKGROUND**

Plaintiff is currently fifty-six years-old, has a high school education, and has worked as a cook at a barbecue restaurant, and at Nintendo in several positions, including pulling inventory and stock, on “order patrol,” and in shipping, which required him to drive a delivery truck. Tr. 53-55, 30-31.

On November 2, 2020, Plaintiff applied for benefits, alleging disability as of March 31, 2020. Tr. 17, 209-17. His application was denied initially and on reconsideration. Tr. 65-89. The ALJ conducted a hearing on April 20, 2023, and the ALJ subsequently found Plaintiff not disabled on May 16, 2023. Tr. 39-64, 17-33. The Appeals Council denied Plaintiff's request for review, and the ALJ's decision is the Commissioner's final decision. Tr. 1-6. The parties consented to proceed before the undersigned Magistrate Judge. Dkt. 2.

## DISCUSSION

### A. Medical Opinion Evidence

Plaintiff challenges the ALJ's evaluation of two medical opinions, arguing the ALJ erred in failing to incorporate into the assessed RFC the opined limitations from those opinions regarding Plaintiff's likely absenteeism and need to be off task.<sup>1</sup> Dkt. 11 at 9.

#### 1. Treating Physician, Dr. Jolie Keenan

Plaintiff's treating physician, Dr. Keenan, completed a form medical source statement in March 2022, and rendered opinions about Plaintiff's functional limitations. Tr. 963-65. Dr. Keenan did not answer the question regarding the "primary conditions and symptoms" for which she treated Plaintiff. Tr. 963. However, the record shows Dr. Keenan, who had been treating Plaintiff since 2020, examined Plaintiff the same day she completed her opinion and continued to diagnose chronic pain syndrome. Tr. 947-50, 965.

As to Plaintiff's functional limitations, Dr. Keenan opined Plaintiff would miss work at least five days per month due to his medical condition, and he would require 10-30 minutes of

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<sup>1</sup>Plaintiff's counsel, who is admitted pro hac vice, is advised that in future cases before the Court, he is required to carefully review the requirements set forth in this Court's scheduling order, which is issued in all social security appeals. See Dkt. 10. In particular, Plaintiff's counsel should take note of the requirements for setting forth his assignments of error.

1 unscheduled breaks throughout the day. Tr. 963. She further opined Plaintiff needs to shift  
2 between sitting, standing, and walking at will, he could never kneel or crouch, he could only  
3 occasionally lift any weight at all, and that he could never lift items over twenty pounds. Tr.  
4 964. Dr. Keenan also opined Plaintiff was limited to occasional handling and/or fingering and  
5 frequent reaching. Tr. 964.

6 The ALJ found Dr. Keenan’s opinions were only “partly persuasive. . . . to the extent that  
7 it indicate[d] some capacity for light work.” Tr. 28. Beyond that, the ALJ found the opinions  
8 were unpersuasive, lacking both supportability and consistency. Tr. 28. Regarding  
9 supportability, the ALJ found Dr. Keenan “supplied no explanation or objective support for the  
10 limitations on the opinion form,” and that her “contemporaneous examination notes do not  
11 provide much support.” Tr. 28. The ALJ acknowledged Plaintiff reported “chronic thoracic  
12 spine pain,” but noted there was “no history of imaging or workups.” Tr. 28. The ALJ further  
13 characterized Dr. Keenan’s examination as “cursory,” with “[n]o findings [that] support[ed] [the]  
14 limitation of standing, walking, sitting, bending, reaching, or manipulation.” Tr. 28.

15 As for consistency, the ALJ found Plaintiff’s medical records did not show any  
16 impairment affecting Plaintiff’s upper extremities that would support Dr. Keenan’s reaching and  
17 handling limitations, and the records regarding Plaintiff’s lumbar and hip issues did not support  
18 the preclusion of kneeling or crouching. Tr. 28. The ALJ further found Dr. Keenan’s opinion  
19 regarding Plaintiff’s need for unscheduled breaks and absences five or more days per month was  
20 inconsistent with evidence regarding his “stable pain management” and with Plaintiff’s own  
21 testimony regarding his ability to stand, walk, and sit. Tr. 28-29. Finally, the ALJ cited to  
22 Plaintiff’s ability to work at “a medium-exertion job” as a barbeque chef two days per week as  
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1 evidence that undermined Dr. Keenan’s opinion regarding Plaintiff’s ability to “maintain  
2 attendance and remain at his workstation.” Tr. 29.

3 The regulations applicable to this case, required the ALJ to articulate the persuasiveness  
4 of each medical opinion, specifically with respect to whether the opinions are supported and  
5 consistent with the record. *See* 20 C.F.R. § 404.1520c(a)-(c). An ALJ’s consistency and  
6 supportability findings must be supported by substantial evidence. *See Woods v. Kijakazi*, 32  
7 F.4th 785, 792 (9th Cir. 2022).

8 Plaintiff challenges the ALJ’s consistency findings, arguing the ALJ improperly  
9 characterized and discounted his chronic pain syndrome in rejecting Dr. Keenan’s opined  
10 limitations. Dkt. 11 at 11. In support, Plaintiff contends the ALJ erred in characterizing his  
11 medical records and testimony, which demonstrated “chronic pain, leg swelling, and difficulty  
12 standing, walking, and sitting.” Dkt. 11 at 11.

13 Additionally, Plaintiff contends that in rejecting the medical opinion, the ALJ  
14 mischaracterized his testimony regarding his ability to work. Dkt. 11 at 10. Specifically,  
15 Plaintiff asserts the ALJ misconstrued his part-time job as a barbecue chef as “medium work”  
16 when it was, in fact, a “light” work job. Dkt. 11 at 10. Plaintiff further argues the ALJ failed to  
17 account for the “built-in ‘extra breaks’” that Plaintiff was afforded by working only part-time  
18 two days per week for five to six hours per day. Dkt. 11 at 10. He contends his ability to work  
19 part-time is not comparable to his ability to sustain full-time competitive work. Dkt. 11 at 12.

20 Even if the Court were to agree with Plaintiff on the above arguments and found the ALJ  
21 erred as to his consistency findings, controlling Ninth Circuit precedent requires the Court to  
22 nevertheless find this error was harmless. That is because Plaintiff here overlooks the ALJ’s  
23 supportability findings entirely in both his opening and reply briefs. *Cf.* Dkt. 13 at 7, 9. Those

1 unchallenged supportability findings regarding Dr. Keenan’s opinion constitute a sufficient  
2 independent basis for the ALJ to conclude that Dr. Keenan’s medical opinion was unpersuasive –  
3 even if the ALJ’s findings regarding the consistency factor were erroneous. *See Woods*, 32 F.4th  
4 at 792-94 & n.4 (consistency and supportability constitute two distinct factors that should be  
5 treated separately); *accord Vincent W. M. v. Comm’r of Soc. Sec.*, No. C23-5549-BAT, 2024 WL  
6 808114, at \*4 (W.D. Wash. Feb. 27, 2024); *Gary J.D. v. Comm’r of Soc. Sec.*, No. C22-1821-  
7 BAT, 2023 WL 5346621, at \*8 (W.D. Wash. Aug. 21, 2023).

8 Because the ALJ’s rejection of Dr. Keenan’s opinion was sufficiently supported by the  
9 ALJ’s unchallenged supportability findings, this claim fails.

## 10 **2. Examining ARNP, Olivia Aniche**

11 In March 2022, examining ARNP, Olivia Aniche, diagnosed Plaintiff with hip pain,  
12 bilateral leg swelling, arthritis, high blood pressure, pulmonary embolism, and generalized body  
13 aches. Tr. 901. She opined that, based on a review of eight pages of medical records and her  
14 examination, Plaintiff was able to stand and/or walk for at least two hours per day and to sit for  
15 at least four hours per day. Tr. 901. ARNP Aniche further opined Plaintiff could lift ten pounds  
16 frequently, and twenty pounds occasionally. Tr. 901.

17 Additionally, ARNP Aniche opined Plaintiff could only occasionally climb, balance,  
18 and/or kneel, and that he could never stoop, crouch, or crawl. Tr. 902. She opined Plaintiff had  
19 no manipulative or reaching limitations. Tr. 902.

20 The ALJ found ARNP Aniche’s opinion unpersuasive, and, in support, found it was  
21 vague, and lacked supportability and consistency. First, the ALJ found the opinion vague  
22 because it failed to specify Plaintiff’s maximum capacity, prefacing the time limits for sitting,  
23 standing, and walking with “at least.” Tr. 29. The ALJ also found the opinion was not supported

1 because ARNP Aniche reviewed only eight pages of records from a coagulation clinic, which did  
2 not contain physical examination findings. Tr. 29. The ALJ further noted the May 2021  
3 imaging ARNP Aniche reviewed did not include ordering physician, Dr. Phan’s “relatively  
4 normal” examination findings made contemporaneously with the examination. Tr. 29. Finally,  
5 the ALJ found the opinion unsupported by ARNP Aniche’s own examination, which, according  
6 to the ALJ, showed “a full lumbar range of motion, normal strength, and grossly normal mobility  
7 of the extremities.” Tr. 29.

8 As for consistency, the ALJ found ARNP Aniche’s opinion inconsistent with medical  
9 records that showed Plaintiff’s “general[] stability and lack of need for an assistive device, lack  
10 of acute distress, lack of edema, normal strength, and only intermittent findings of lumbar or hip  
11 restriction.” Tr. 29. The ALJ also found the records showed “generally stable pain  
12 management,” and that Plaintiff “endors[ed] preservation of daily functioning.” Tr. 29.

13 In addition to the medical records, the ALJ again cited to Plaintiff’s testimony regarding  
14 the efficacy of his pain medication, and to Plaintiff’s continuing ability to “work six to seven-  
15 hour shifts on his feet twice per week.” Tr. 29.

16 Plaintiff repeats the same arguments he raised regarding the ALJ’s evaluation of Dr.  
17 Keenan’s opinion. Dkt. 11 at 9-12; *see also* Dkt. 14. Those arguments are again limited to the  
18 ALJ’s consistency findings, and Plaintiff fails to challenge the ALJ’s supportability findings.  
19 Like Dr. Keenan’s opinion, the ALJ’s unchallenged supportability findings regarding ARNP  
20 Aniche’s opinion themselves constitute a sufficient independent basis for the ALJ to conclude  
21 that the medical opinion was unpersuasive – even if the ALJ’s findings regarding the consistency  
22 factors were erroneous. *See Woods*, 32 F.4th at 792-94 & n.4.

1 For these reasons, Plaintiff fails to show that the ALJ harmfully erred in evaluating the  
2 challenged medical opinion evidence.

3 **B. Past Relevant Work Finding**

4 Plaintiff additionally challenges the ALJ's failure to develop the record and make  
5 findings regarding whether his prior hand packaging job at Nintendo was performed for a  
6 sufficient length of time and at a "substantially gainful activity level." Dkt. 11 at 13-14. The  
7 Commissioner counters that Plaintiff failed to comply with the Court's scheduling order, and  
8 thus waived the issue. Dkt. 13 at 2 n.1. Nevertheless, the Commissioner addressed the issue on  
9 the merits, arguing "any alleged error by the ALJ at step four [was] harmless because the ALJ  
10 continued the sequential evaluation and found Plaintiff not disabled at step five." Dkt. 13 at 2  
11 n.1.

12 The Court will address Plaintiff's argument despite his technical failure to list the issue at  
13 page one of his opening brief. In doing so, the Court notes Plaintiff's opening brief provided the  
14 Commissioner with sufficient notice of the argument, and that, as noted above, the  
15 Commissioner responded on the merits. Dkt. 11 at 13-14.

16 The ALJ's finding that Plaintiff's hand packaging job constituted past relevant work was  
17 not supported by substantial evidence. In concluding that Plaintiff performed past relevant work  
18 as a hand packager, the ALJ parsed out one of several separate jobs that Plaintiff testified he  
19 performed while working at Nintendo from 2007-2009 but failed to conduct the requisite factual  
20 development as to whether the hand packaging job itself constituted substantial gainful activity  
21 ("SGA") and/or how the job was in fact performed. *See* 20 C.F.R. § 404.1565(a); Social  
22 Security Ruling ("SSR") 82-62, *Titles II and XVI: A Disability Claimant's Capacity to do Past*  
23 *Relevant Work, In General*, 1982 WL 31386 (requiring ALJ to make findings as to the physical

1 and mental demands and the stress of the past work); *see also* Tr. 30-31, 53-55. This same error  
2 infected the ALJ's step five analysis when the ALJ concluded that even at an advanced age,  
3 beginning November 12, 2022, Plaintiff was "capable of past relevant work as a hand packager,  
4 *as that work was actually performed.*" Tr. 33 (emphasis added). Accordingly, the error was not  
5 harmless.

### 6 CONCLUSION

7 For the foregoing reasons, the Commissioner's decision is **REVERSED**, and this case is  
8 **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

9 The Court affirmed the ALJ's treatment of the challenged medical evidence. On remand,  
10 the ALJ shall further develop the record regarding Plaintiff's past position as a hand packager at  
11 Nintendo and make findings in accordance with 20 C.F.R. § 404.1565(a) and SSR 82-62,  
12 including but not limited to findings regarding how Plaintiff's past position was performed and  
13 whether the position constituted SGA. The ALJ shall subsequently reconsider his step four and  
14 step five findings as to whether Plaintiff was capable of performing his past work both prior to  
15 and following his attainment of advanced age on November 12, 2022.

16 DATED this 16<sup>th</sup> day of August, 2024.

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BRIAN A. TSUCHIDA  
United States Magistrate Judge

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